REDACTED

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

- against -

A $20 GOLD COIN, KNOWN AS A 1933 "DOUBLE EAGLE" MINTED AT THE UNITED STATES MINT IN PHILADELPHIA, PENNSYLVANIA,

Defendant-in-Rem.

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96 Civ. 2527 (AKH)

Supplemental Declaration of Barry H. Berke In Support Of Motion For Summary Judgment

State of New York )
) ss.:
County of New York )

BARRY H. BERKE, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746:

1. I am a member of the law firm of Kramer, Levin, Naftalis & Frankel, counsel to claimant Stephen C. Fenton in this matter. I submit this supplemental declaration to make conveniently available to the Court the materials cited in Claimant's Reply Memorandum of Law in Support of His Motion for Summary Judgment.

2. The attached exhibits are true copies of the following:

| Exhibit | Description |
|---|---|
| A | Supplemental excerpts of the January 18, 2000 deposition transcript of Andre De Clermont |
| B | Supplemental excerpts of the August 4, 2000 deposition transcript of Mr. Fenton |

| Exhibit | Description |
|---|---|
| C | October 3, 1995 Wire Transfer Purchase Advice form from Knightsbridge Coins |
| D | October 3, 1995 Funds Transfer- Debit Advice form from Barclays |
| E | The Numismatist, April 1937 |
| F | Compton's Encyclopedia Online Entry for Nellie Tayloe Ross |
| G | March 4, 1999 Letter from Jane A. Levine to the Honorable Alvin K. Hellerstein |
| H | January 26, 1999 Letter from Jane A. Levine to the Honorable Alvin K. Hellerstein |
| I | May 27, 1965 Memorandum from Miss Hayden to Miss Adams |
| J | Buyer's Guide to United States Gold Coins, Q. David Bowers |

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
March 17, 2000

Barry H. Berke

KL3:2024056.1

RECYCLED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
-v-
A $20 GOLD COIN, KNOWN AS A 1933 "DOUBLE EAGLE" MINTED AT THE UNITED STATES MINT IN PHILADELPHIA, PENNSYLVANIA.
Defendant in-rem

96 Civ. 2527(JSM)

DEPOSITION UPON ORAL EXAMINATION

OF

ANDRE PAUL DE CLERMONT

On Tuesday, January 18, 2000
Commencing at 09.55 a.m.

Taken at:
The Embassy of the United States of America,
24 Grosvenor Square,
London W1A 1AE, United Kingdom.

Reported by: Amy Jenkins, AAPSW



APPEARANCES

On behalf of the Claimant:
Kramer Levin Naftalis & Frankel LLP
Attorneys at Law
919 Third Avenue
New York, N.Y. 10022

By: BARRY H. BERKE

On behalf of the Defendant in-rem

US Department of Justice
US Attorney's Office
Southern District of New York
One St. Andrew's Plaza
New York, NY 10007

By: JANE A. LEVINE
Assistant United States Attorney

In Attendance:

Mr. Stephen Fenton (Claimant)

Court Reporters:

Marten Walsh Cherer Limited
Midway House
27/29 Cursitor Street
London EC4A 1LT
England

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ERRATA

CORRECTION PAGE

Please make all corrections on this sheet and not on the transcript itself. Thank you.

it was never formally agreed between us a specific amount. That is all.
Q. You have no explanation for that other then because the price of this coin was higher?
A. Yes, because it was much more valuable coin.
MR. BERKE: Objection.
BY MS. LEVINE:
Q. Because it was a more valuable coin you felt that somehow you did not want to pin down precisely the amount of the commission or profit?
MR. BERKE: Objection, misstates the testimony.
BY MS. LEVINE:
Q. If it is not correct, correct me.
A. I am sorry, can you repeat it again? I was slightly thrown by that.
MS. LEVINE: Can you read back my last question?
(The Reporter read the question as requested)
THE WITNESS: Also Mr. Fenton indicated that he did not know how long it would take. I realised that money costs money. If you tie up $200,000 in a coin and you do not sell for



six months or maybe a year, you have quite a high cost on that. That was another factor to consider why I did not feel the need to make it a specific, agreed commission. There is nothing mysterious in it, other than that
BY MS. LEVINE:
Q. Did Mr. Fenton ever discuss with you the source of funds he used to pay for the coin?
A. No.
Q. Mr. Fenton then wired funds directly to . ?
A. Yes.
Q. Did he take possession of the coin?
A. Yes.
Q. After that, after he took possession of the coin, did you have any discussion with him about what he was going to do with it?
A. No, just as I had no value discussion with any of the previous American coins.
Q. He never told you whether or not he was trying to sell it?
A. I assume that he was going to try to sell it, yes, but we never discussed anything after that.
Q. Were you involved in any way with



any of his efforts to try to sell it?
A. No.
Q. You were not aware of anything that he did or did not do to try to sell it?
A. No, nothing at all.
Q. Can you explain Mr. de Clermont, why is not there any documentation in the documents you produced to me reflecting your purchase of the 1933 double eagle?
A. Because as the money did not go through my account, there was no paperwork to create ie. purchase. Even if you simply act as the transfer of the money, then for our own accounting purposes I would have to show why I had received money, why I had sent it and I would produced papers. Because the money went directly from him to there, there was nothing to generate.
Q. You never received a penny from any source, is that right, relating to this coin?
A. No, that would only become due when the coin was sold.
Q. Are you saying that you do not even consider your company really involved in the transaction betweer and Mr. Fenton?
MR. BERKE: Objection to the form of



the question. You may answer.
THE WITNESS: As I far as I was concerned, I trust Mr. Fenton. I have known him for all of these years, nearly 30 years. I trust him that he was not going to sell the coin and tell me that he had sold it for ten dollars more than he paid for it. I trusted him. I still trust him and that is why I left it with him. I knew that when it was sold, I would benefit. I was perfectly happy with that agreement.
BY MS. LEVINE:
Q. Do you have any opinion as to what the market value of the 1933 double eagle —
A. No.
Q. Listen to my question. — what the market value of the 1933 double eagle was at the time you purchased it, or I should say, at the time you assisted with Mr. Fenton in purchasing it?
A. No, I left that to Mr. Fenton.
Q. Did you have any view at the time?
A. No, I have not been dealing in the world markets, as I explained to you, particularly by that point.
Q. I asked just whether you had a view?
A. No, I did not.



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Exhibit B

Exhibit C

Exhibit D

Exhibit E

Exhibit F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
v. 96 CIV. 2527 (AKH)
A $20 GOLD COIN, Known as a 1933 "Double Eagle" Minted at the United States Mint in Philadelphia Pennsylvania,
Defendant.
Stephen C. Fenton,
Claimant.

August 4, 1999
11:00 a.m.

Continued deposition of Stephen C. Fenton, taken by Plaintiff, at the offices of the United States Attorney, Fifth Floor Conference Room, One St. Andrew's Plaza, New York, N.Y., before Brandon Rainoff, an Official Court Reporter and Notary Public of the State of New York.



APPEARANCES

U.S. DEPARTMENT OF JUSTICE
U.S. ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, N.Y. 10007
(212) 637-1063
BY: JANE E. LEVINE
ASSISTANT UNITED STATES ATTORNEY

KRAMER LEVIN NAFTALIS & FRANKEL LLP
ATTORNEYS FOR CLAIMANT
919 THIRD AVENUE
NEW YORK, N.Y. 10022
BY: BARRY H. BERKE



**MS. LEVINE:** We are back on the record.

**Q:** I can ask Mr. Fenton if you understand that you are still under oath from yesterday or I can have you resworn if you feel that's necessary.

**A:** No, I understand.

**Q:** So we are continuing the deposition from yesterday. We had a conference with the judge yesterday, and at the conclusion of that conference Mr. Berke expressed a desire to come back and possibly answer certain questions to which you had invoked the Fifth Amendment yesterday. That's the purpose of this.

I am going to proceed with certain questions that I understand you might be willing to provide answers to.

**MR. BERKE:** And if I may briefly, Ms. Levine stated it correctly, the judge had made other comments regarding my request that Mr. Fenton be permitted to withdraw certain invocations of his Fifth Amendment rights and provide answers which are stated in a separate record of those proceedings, and I would just



note that Mr. Fenton's testimony today continues under the grant of immunity that the government did offer which is embodied in a separate letter, and clarified in a more recent letter dated August 2nd, if that's accurate.

**MS. LEVINE:** Well, actually, can we go off the record?

(Discussion off the record)

**BY MS. LEVINE:**

**Q:** Okay. Mr. Fenton, I am going to pick up with a line of questioning that we went over yesterday, and I would like to start by asking you when did you acquire the 1933 Double Eagle coin which is the subject of this lawsuit?

**A:** In 1995.

**MR. BERKE:** Can I ask the court reporter one question?

(Discussion off the record)

**BY MS. LEVINE:**

**Q:** Just to clarify the section of questioning where I am continuing from, yesterday's transcript has been produced to us and I am loosely following the questions that appear starting on page 80, approximately line

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A: I don't recall exactly what happened.
Q: But you don't recall there being a wide discrepancy in what he was asking for and what you offered?
A: No.
Q: Now, when he called you to offer you the coin, did you tell anyone?
A: No.
Q: Did you tell Mr. Brown in your shop?
A: Yes, sorry, I told Mr. Brown. He was —
Q: I'm sorry. I didn't let you finish.
A: He was the other person I told.
Q: He was the only person you told?
A: At the time I was offered it, yes.
Q: What did Mr. Brown say about it?
A: He said it will be a nice coin, an interesting coin to purchase.
Q: And that's it?
A: That was it.
Q: Up to the time that you actually agreed on the price, had you told anybody, discussed it with anybody?
MR. BERKE: Other than Mr. Brown?

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MS. LEVINE: Other than Mr. Brown.
A: No.
Q: So you didn't discuss your offering price with any of your colleagues or friends?
A: No.
Q: Did you have anybody else examine the coin?
A: No.
Q: Just trying to get an accurate picture. You didn't tell anybody about the coin prior to the time you bought it?
A: No.
Q: Now, when you actually bought the coin, tell me how that worked, the mechanics of purchasing it?
A: Once we had agreed the price, I arranged to pay Mr. Declermont and then he would arrange to give me the coin.
Q: How did that work?
A: We paid him the money, he handed —
Q: How?
A: We did a bank transfer.
Q: A wire?
A: Bank wire, yes.

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Q: So he gave you wiring instructions to his account?
A: He gave me wiring instructions, yes.
Q: And then he delivered the coin, the coins to you?
A: Yes.
Q: You have records in your shop to reflect the transaction?
A: Yes.
MS. LEVINE: I think I have asked for the production of them, but I will ask again.
MR. BERKE: I'm sorry, there was a disconnect in the question and answer. I don't know if you want to clarify.
You asked if he gave wiring instructions to his account. Mr. Fenton said he gave wiring instructions. Then I think you asked follow-up questions. If you want me to clarify — did you understand the wiring instructions to be to his account?
THE WITNESS: We were to wire the money to an account, yes, we were given details.
BY MS. LEVINE:

Page 2[illegible]

Q: As to which — well, were you purchasing the Double Eagle from Mr. Declermont or from a principal who he was representing?
A: We were actually purchasing it off of him, he was the person with the coin, so —
Q: You believed him to be the owner? Did you believe him to be the owner of the coin?
A: No, I think he was acting as a middleman on it.
Q: Who do you believe he was acting as a middleman for?
A: I believe it was this
Q: You say you believe that, but did Mr. Declermont tell you at any time that that is the person who he acquired the coin from?
A: Yes, he did.
Q: When did he tell you for certain that the actual seller of the '33 Double Eagle was ?
A: At the time.
Q: At the time?
A: Yes.
Q: That you bought it?

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Exhibit G Exhibit H Exhibit C Exhibit D Exhibit E Exhibit F

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A: Yes.
Q: Did you ask him "where did you get this coin"?
A: I believe I did, yes.
Q: How did that conversation come about?
A: I think what I said to him was is this the same source as the other pieces and he said yes, that he had been buying over the years.
Q: What exactly did you ask him that prompted him to tell you who the person was that he was acting for?
A: I said is this, as I said, is this from the same source as the other pieces and he said yes.
Q: But what I am asking you, Mr. Fenton, is what prompted him to identify the source?
MR. BERKE: By name.
Q: By name?
A: Because I said is it the same person and he said yes, it is
Q: But prior to that he had not told you who the actual source was?
A: I don't recall asking him immediately

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before, no.
Q: Okay. How did he deliver the Double Eagle to you?
A: He just gave it to me in the safe deposit.
Q: So was it at any point in your shop?
MR. BERKE: You mean up until the time he purchased it or after he purchased it?
MS. LEVINE: Why don't I clarify.
Q: He delivered it to you by, simply in the safe deposit area, moved it from his space to your space?
A: Absolutely, that's exactly what happened.
Q: Is that the same for the other coins you bought at the same time?
A: I don't remember if they were given to me in the safe deposit or he gave them to me in the shop.
Q: The other coins, that is?
A: That's right, yes.
Q: Okay. So after you completed the purchase of the '33 Double Eagle, what — it was in your safe deposit box in London?

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A: That's correct, yes.
Q: Then what did you do with it next?
A: I really didn't do anything with it for a little while —
MR. BERKE: I'm sorry, do you mean what did he physically do with it?
MS. LEVINE: Well, I am getting to what — yes.
Q: Well, first, how long did it remain in your safe deposit box?
A: I think a few months.
Q: You said that up until the time you acquired it you never told anyone else other than Mr. Brown that you had acquired a '33 Double Eagle. When was the first time you told another person that you had a 1933 Double Eagle in your possession?
MR. BERKE: And as I mentioned to Ms. Levine at the outset, I can't remember whether it was on the record or off the record, Mr. Fenton is prepared to provide responsive answers to all questions leading up to his purchase and including his purchase of the 1933 Double Eagle. I believe we are at that point

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now.
MS. LEVINE: Okay. Let me do this. Let me take a break because what I would like to do is review the transcript section just to make sure that I have covered the questions that he will now answer because I understand your demarcation. Take a short break.
MR. BERKE: Sure.
(Recess)
BY MS. LEVINE:
Q: Mr. Fenton, have you ever spoken to ?
A: No.
Q: Have you ever attempted to contact him?
A: No.
Q: Are you aware whether anyone has contacted him on your behalf?
A: As far as I know they haven't.
Q: Do you know whether is a coin collector?
A: I have no idea.
Q: Do you know anything about him other than what you have told me, that he — well,

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MR. BERKE: I don't know if you want to clarify —

BY MS. LEVINE:

Q: Well, yesterday we did discuss that Jim Brown had some discussions with Jet Air, with persons at Jet Air and we reviewed some documents that he prepared at your direction?

A: That's correct.

Q: So I take it that he is someone who at least had some involvement in the importation of the coins?

A: That's correct.

Q: So in that sense you may have discussed with him how you would import the coins into the United States?

A: Right —

MR. BERKE: I think Ms. Levine is including everything, including the paperwork, the manner which you bring it in, everything.

THE WITNESS: I must have misunderstood the question, the words, because if you are using the word "mechanics," I assumed how I was actually going to carry it in my case or which form the box would be going to

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go in the case, and if that's what you mean, no, I don't really recall having a conversation with Mr. Brown.

But did he know I was taking the coins? Yes, he did, because he helped me prepare the paperwork. He typed it out.

MR. BERKE: Then other than Mr. Brown, did you discuss any of those aspects of your importation of the coin with anyone else?

THE WITNESS: Besides Jet Air, no.

BY MS. LEVINE:

Q: Did you discuss any issues relating to bringing the coin into the United States with Mr. Perino?

A: No.

Q: Did you have any discussions with Mr. Perino about bringing the coin into the United States?

A: Is that the same question or a different way? It's the same answer. No, I didn't.

MR. BERKE: I think your question was right, if it is the same question. I'm not sure I understand the question either.

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MS. LEVINE: Yes, let me ask it again because I don't think I meant it to be the same question, but it may not have been clear.

Q: Did you discuss with Mr. Perino at any time any difficulties that might arise in bringing the 1933 Double Eagle into the United States?

A: No.

Q: So you never expressed to Mr. Perino any concern on your behalf about bringing the 1933 Eagle into the United States?

A: No.

Q: Did you ever express any preference to him for conducting any transaction for the 1933 Double Eagle in Europe?

A: Sorry, can you repeat the question?

MS. LEVINE: Well, if I am getting answers to these questions, I feel the door is going to be opened and that's where —

MR. BERKE: That's why I am trying to give a little leeway. I didn't want to cut you off in terms of importation issues. That question I thought would probably be the last question, then — beyond the importation

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issues.

I am taking the judge's comments as well in terms of how to answer and I am trying to be consistent with that. Mr. Fenton is prepared to answer anything and everything leading up to and including his purchase of the coin as well as questions regarding his bringing the coin into the United States.

MS. LEVINE: Right, but —

MR. BERKE: I was letting you to go that question because I understood that it related to the importation of the coin. That's how I interpreted it. If I misinterpreted it, then —

MS. LEVINE: Well, the problem here is that it is a fine line between having him answer questions that he feels comfortable answering and not invoking the Fifth because he thinks the answer is going to be helpful, and then not answering other questions that are really on the same topic that may — and that's, you know —

MR. BERKE: That's not our intent. I think that's why we have tried to articulate

# Knightsbridge Coins

S. C. FENTON, *B.N.T.A..A.N.A.*

43 DUKE STREET,
ST. JAMES'S
LONDON SW1Y 6DD
Tel: 0171-930 8215
0171-930 7597
Fax: 0171-930 8214

VAT Registration No. : GB 241 2663 86

PURCHASE ADVICE

I, the undersigned, am the owner of / have authority to sell the items which I now dispose of to Knightsbridge Coins.

Description of items Group of U.S Gold Coins £141,706.92
($220,000)

Name NAT WEST

Address NOTTING HILL GATE.
W.11.

Signature

~~Draft~~ / ~~IMO~~ T/T. $ etc.

~~Cash~~ / ~~Cheque No~~

Purchase No. 11720.

Date 3.10.95

TW9 1DU
TELEPHONE 01819409544

# FUNDS TRANSFER - DEBIT ADVICE

2221 1 /1 207217

SC FENTON ESQ
43 DUKES STREET
ST JAMES
LONDON
SW1Y 6DD

006844

| DATE : | 03/10/95 |
|---|---|

| | |
|---|---|
| OUR REF : | 064494 |
| YOUR REF : | 207217/2306 |

WE HAVE ARRANGED TO DEBIT YOUR ACCOUNT ON 03/10/95 AS FOLLOWS :-

| YOUR ACCOUNT | 20721742324244 |
|---|---|

| DEBIT AMOUNT | 220,000.00 | USD |
|---|---|---|
| PAYMENT AMOUNT | 220,000.00 | USD |

| EXCHANGE RATE | |
|---|---|
| VALUE DATE | 05/10/95 |

| FROM: | TO: |
|---|---|
| KNIGHTSBRIDGE COINS<br>43 DUKES STREET<br>ST JAMES<br>LONDON<br>SW1Y 6DD | NAT WEST NOTTING HILL GATE LONDON W<br>11 3ZP 60 15 33 |

| IN FAVOUR OF: |
|---|
| AMR LAKKANI |

| PAYMENT DETAILS |
|---|
| |

| DETAILS OF CHARGES | AMOUNT | CURRENCY | RATE | CHARGES ACCOUNT EQUIVALENT |
|---|---|---|---|---|
| OUR COMMISSION | 20.00 | GBP | 1.586 | 31.72 |
| COVER BANK | 3.00 | GBP | 1.586 | 4.76 |
| TOTAL DEBITED FROM YOUR CHARGES ACCOUNT | | USD | 20721742324244 | 36.48 |

THIS ADVICE IS COMPUTER GENERATED REQUIRING NO SIGNATURE

Exhibit I Exhibit J Exhibit E Exhibit F

**New York Numismatic Club, New York City**—Meets second Friday of each month. F. C. C. Boyd, Secretary, 337 East 20th St., New York City.

**Northampton Numismatic Society, Northampton, Mass.**—Meets fourth Wednesday of each month at Y. M. C. A. Building. Myron J. Parsons, Secretary, 370 Pleasant St., Northampton, Mass.

**Northwest Coin Club**—Meets first Thursday of each month at the Curtis Hotel in Minneapolis, and the third Thursday of each month at the St. Paul Hotel, St. Paul, Minn. W. T. Hartman, Secretary, 4414 46th Ave. S., Minneapolis, Minn.

**Omaha Coin Club, Omaha, Neb.**—Meets first Friday evening of each month at Omaha City Hall. Louis W. Kroeger, Secretary, 3564 S. 24th St., Omaha, Neb.

**Oregon Numismatic Society, Portland, Ore.**—Meets second Monday night of the month at Portland Chamber of Commerce. O. E. Nathan, Secretary, 811 S. W. Park Avenue, Portland, Ore.

**Pacific Coast Numismatic Society, San Francisco, Cal.**—Meets last Wednesday of each month at Hotel Whitcomb, San Francisco. Harvey L. Hansen, Secretary, 698 Haddon Road, Oakland, Cal.

**Philadelphia Coin Club, Philadelphia, Pa.**—Meets second Thursday of each month at the Central Y. M. C. A., Broad and Arch Sts. George J. Patterson, Secretary, P. O. Box 4856, Central Y. M. C. A., Philadelphia, Pa.

**Pittsburgh Coin Club**—Meets first Wednesday of each month in the Downtown Y. M. C. A. Building, Third Ave. and Wood St. Howard Gibbs, Jr., Secretary, 1400 Belasco Ave., Pittsburgh, Pa.

**Rochester Numismatic Society, Rochester, Minn.**—Meets first Monday of each month in Chamber of Commerce Building. Dana A. Rogers, Secretary, 816 First St., S. E., Rochester, Minn.

**Rochester Numismatic Association, Rochester, N. Y.**—Meets first and third Tuesday at Municipal Museum. J. B. Harsinski, Secretary, 9 Arlington St., Rochester, N. Y.

**Rocky Mountain Numismatic Society, Denver, Col.**—Meets first and third Thursdays of each month, unless otherwise ordered, at homes of individual members as selected. Jacob G. Willson, Secretary-Treasurer, Room 15, State Capitol, Denver, Col.

**St. Louis Numismatic Society, St. Louis, Mo.**—Meets monthly at Washington University. T. E. Duncan, Secretary, Washington University, St. Louis, Mo.

**St. Paul Numismatic Association, St. Paul, Minn.**—Meets second and fourth Tuesdays in the Pioneer Building. J. H. Harkins, Secretary, 114 East Fourth St., St. Paul, Minn.

**Seattle Coin Club, Seattle, Wash.**—Meets the last Thursday of the month at 4160 Stuart Building, Seattle. C. C. Saeman, Secretary, 11745 Sand Point Way, Seattle, Wash.

**Springfield Coin Club, Springfield, Mass.**—Meets second Wednesday of each month at the Museum of Fine Arts, Springfield. William W. Willard, Secretary, 94 Warren Terrace, Longmeadow, Mass.

**Syracuse Numismatic Association, Syracuse, N. Y.**—Meets second and fourth Tuesdays of each month at the Onondaga Hotel. Robert G. Evens, Secretary, 149 Berkshire Ave., Syracuse, N. Y.

**Tennessee Coin Club, Nashville, Tenn.**—Meets first and third Mondays of each month. Floyd L. Martin, Secretary, 800 Warner Building, Nashville, Tenn.

**The Numismatic and Antiquarian Society of Philadelphia, Pa.**—Meets six times a year. January, February, March, April, November and December. Henry Paul Busen, Secretary, 1006 Spruce St., Philadelphia, Pa.

**Utica Coin Club, Utica, N. Y.**—Meets first and third Tuesdays of each month at 249 Genesee St. F. Harrington, Secretary, 249 Genesee St., Utica, N. Y.

**Waterbury Coin Club, Waterbury, Conn.**—Meets second and fourth Tuesday at Mattatuck Historical Society, 119 West Main St. Arnold B. Grasso, Secretary, 81 Charles St., Waterbury, Conn.

**Washington Numismatic Society, Washington, D. C.**—Meets second Tuesday of each month at Hotel Washington. Frederic E. Hodge, Corresponding and Recording Secretary, 135 Bryant St., N. W., Washington, D. C.

**Westchester County (N. Y.) Coin Club**—Meets third Tuesday of each month at the Y. M. C. A. in New Rochelle, N. Y. J. H. White, Secretary, 29 South Broadway Dobbs Ferry, N. Y.

**Western Pennsylvania Numismatic Society**—Meets the first Tuesday of every month at the Carnegie Institute of Pittsburgh. A. C. Gies, Secretary, 6360 Frankstown Avenue, Pittsburgh, Pa.

**Western Reserve Numismatic Club, Cleveland, Ohio**—Meets second Wednesday of each month at the Allerton Hotel. Ray D. Walston, Secretary, 3276 De Soto Ave., Cleveland Heights, Ohio.

**Youngstown Numismatic Club, Youngstown, Ohio**—Meets third Friday of each month at the Home Saving and Loan Co., basement, corner Federal and Chestnut Streets. Frank W. Schilling, Secretary, 446 Brenden Ave., Youngstown, Ohio.

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NEW YORK NUMISMATIC CLUB—339th meeting, March 12. Arthur W. Deas, president, presiding. Twenty-seven members and one guest were present.

The topic for the evening was "United States Cents from 1793 to 1816 and Coins of Communistic States and Peru." Exhibits were as follows:

Howland Wood: Seven coins of the Chinese Soviet Union; silver dollar and 20-cent piece, copper 500 and 200 cash of Sze Chuen and Shensi Union. Silver dollar and copper 5-cash piece of the Hu-peh, Anhwei and Honan Union.

Exhibit I Exhibit J Exhibi

S. Mosher: Denarius struck by Augustus, B. C. 12, showing head of Julius Caesar with comet above. Bronze token of Ephesus issued during imperial times by a doctor, advertising an eye salve.

J. Barnet: Hard Times token, Roxbury Coaches, struck in copper.

D. M. Bullowa: Russian Bank Notes: Federated Soviet Socialistic Republics of Russia, 1919, Workers of the World Series: 100, 250, 500, 1000 and 5000 rubles. Federated S. S. R. of Russia, State bank notes, 1922, 1, 3, 5, 10, 25 and 50 rubles. Union of Soviet Socialistic Republics: State bank note, 1923, 15,000 rubles. U. S. S. R., 1 ruble, 1928, type now in circulation.

W. Ray Carpenter: Charles I, Crown, Tower mint. Edward VII, pattern Crown, 1902, of which only 26 were struck. Edward VIII, Abdication medal in silver and coronation medals. These were struck by private firm.

W. H. Arthur: 1794 cent, V. G.; 1803 cent, ex. fine; 1814 cent, unc.; Set of 1937 Lincoln cents, P, D, S; 1921 U. S. Quarter (rare).

H. Stein: Tetradrachm of Alexander Zebina, King of Syria, and Greek bronzes from Carthage, Spain, Sicily and Malta.

E. W. May: Soviet Notes, two 100,000 rubles of 1921, one punch-canceled with half a dozen stars. Several notes of the Second Soviet issue, and a current 1 ruble note of 1924.

Vernon Brown: Mexico 5 and 10 centavos, 1938, nickel; $10 note of the Maiden Lane National Bank, New York, series of 1903; $1 Townsend Plan money of Chelan, Wash., 1937; $1 check, Townsend Plan money of Brewster, Wash., 1937.

M. Kortjohn: United States Cents, 1793 to 1816, including 1793 liberty cap. Eleven minor Soviet coins.

J. Guttag: Reproduction piece-of-eight. Twenty-eight 8-reals coins of Peru of various dates, rulers and mints, and a pattern peso of 1855.

L. Kusterer: U. S. Cents: 1793, Liberty cap; 1795, 1797, D. 84, edge milled in dots; 1798, unc.; 1805, unc.; 1806, unc.

Moritz Wormser: Soviet China, 3 silver, 5 copper; Soviet Russia, gold tchervonetz; Peru, 3 gold, 21 silver, including Arequipa and Pasco Mints.

F. C. C. Boyd: Collection of Proof Sets of Soviet Russia, 1921 to 1928. New Acquisitions, 1933 double eagle and eagle.

The secretary reported the death of Mrs. Dudley Butler and informed the club that a floral piece was sent to the funeral.

Mr. Bullowa reported for the medallic art committee that the artist, J. M. Swanson, had started work on the Newell Presidential medal and that subscriptions to the medal were as follows: Bronze, $2; silver, $5. Mr. Bullowa also requested subscription orders for the medals, which resulted in the secretary receiving orders for 23 bronze and 14 silver medals.

The executive committee suggested as the topic for the April meeting, "United States Cents from 1816 to 1857 and English Numismatic Items in Relation to Coronations, Weddings and Deaths." This was adopted.

The secretary read a letter from the Westchester County Coin Club, which was turned over to the executive committee for their deliberation and action.

The membership committee reported the application of George W. Husker, 60 Park Place, Newark, N. J. This application will be brought up for action at the next meeting of the club.

The publication committee reported progress.

Edward T. Newell informed the club that F. C. C. Boyd had been appointed appraiser for the numismatic collection of the late E. H. R. Green.

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BRONX COIN CLUB—Forty-second meeting, February 24, President Sghia presiding. Twenty-four members and seven guests were present.

The secretary was instructed to write a letter to the Norfolk Advertising Board advising them that the club has discontinued club buying of commemorative coins and that the members would write for their own coins. A letter from the Detroit Coin Club was read and the members present were urged to write their Congressmen asking them to support the bill for the Michigan half dollar inasmuch as the event commemorated was one of national importance.

Three papers were read on the topics of the evening by Messrs. Stein, Bullowa and Hentgen on the coins of Augustus from the Battle of Actium to his death; the German republican coinage from the war to date, and

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# ROSS, Nellie Tayloe

Ferguson, Miriam Amanda

(1876-1977). The first woman in the United States to serve as governor of a state was Nellie Tayloe Ross of Wyoming. During Franklin D. Roosevelt's first term as president, she also became the first woman to head the United States Mint.

Nellie Tayloe Wynns was born in St. Joseph, Mo., on Nov. 29, 1876. She married lawyer William Bradford Ross in about 1900 and moved with him to Cheyenne, Wyo. After practicing law for 20 years, he was elected governor of Wyoming in 1922. He died a month and two days before the end of his term, and his widow was chosen to replace him. In the election of Nov. 4, 1924, she won the post in her own right. Miriam (Ma) Ferguson of Texas was elected on the same day, but she is considered the second woman governor in American history because Ross took office 16 days earlier. After losing the election of 1926 to a Republican, she served in the Wyoming state legislature.

For six years Ross was vice-chairman of the Democratic National Committee. She was rewarded for her efforts on behalf of Roosevelt's 1933 presidential campaign by being named head of the mint. During her 20-year term (1933-53) the mint introduced the Jefferson nickel, the Roosevelt dime, and the steel Lincoln penny (as a wartime measure to save copper). She lived in retirement in Washington, D.C., until her death on Dec. 20, 1977.

Exhibit G

xhibit H

Exhibit I

Exhibit J

Exhibit H

Exhibit I

Exhibit J

*United States Attorney*
*Southern District of New York*

*The Silvio J. Mollo Building*
*One Saint Andrew's Plaza*
*New York, New York 10007*

March 4, 1999

Honorable Alvin K. Hellerstein
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York

Re: United States v. One $20 Gold Coin, Known as a 1933 "Double Eagle," Minted at the United States Mint in Philadelphia, Pennsylvania, 96 Civ. 2527 (AKH)

Dear Judge Hellerstein:

The Government respectfully submits this letter in further support of its motion for leave to file a Third Amended Complaint in the above action.

Pursuant to the procedure agreed upon by the parties and approved by the Court, this letter is directed only to the Government's motion to amend and will not "sur-reply" to the points made in Mr. Berke's letter objecting to the Government's request that the Court compel Stephen Fenton, the claimant, and Jasper Parrino, a third party witness, to either appear for depositions under the terms of immunity already offered or to formally assert for the remainder of these proceedings a Fifth Amendment right not to incriminate themselves. Nor will this letter "sur-reply" to Mr. Fenton's request for permission to file a summary judgment motion before resolution of the

discovery/Fifth Amendment question. The Government's position -- that all dispositive motion practice by either side should be deferred until the Government takes Fenton's and Parrino's depositions, or until after they commit to forgo testifying based on their invocation of the Fifth Amendment -- is clearly supported by the case law and Mr. Fenton offers no sound basis for proceeding in any other manner.[1]

The Motion to For Leave to Amend Should Be Granted

Mr. Fenton opposes the Government's request for leave to amend the complaint to add a cause of action for declaratory judgment. Fenton's vigorous opposition to a simple and non-prejudicial amendment of the complaint is without basis.

Mr. Fenton mischaracterizes Federal Rule of Civil Procedure 15(a) as a rule designed to limit litigants' rights to amend pleadings. The express and unambiguous principle behind Rule 15(a) is that leave to amend shall be freely granted. Each one of the cases cited by Fenton, even those where leave is

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[1] The one point that requires a response is Mr. Berke's contention that the Government had "promis[ed]" full blown transactional immunity to Mr. Fenton and later "reneg[ed]" on that commitment. There is no question that during certain recent conversations with Mr. Berke I described the contemplated immunity offer as a "non-prosecution" letter. However, I also told Mr. Berke that the precise terms of the immunity extended could not be final because, as Mr. Berke is well aware, all decisions regarding extension of immunity to witnesses are subject to supervisory review and approval within this Office. In fact, I told Mr. Berke that I would not send him a "draft" letter for that very reason. There was no promise made and no commitment to any particular offer. Moreover, throughout my discussions with Mr. Berke I expressed the Government's view that the applicable case law did not require the Government to extend full transactional immunity to his client.

denied, reiterates that the strong presumption in every request to amend is in favor of granting the amendment. The rule and case law are consistent: it is far preferable for courts to decide cases on their merits.[2] "Narrow pleading rules should not be applied to foil an honest plaintiff's efforts to gain redress." Middle Atlantic Utilities Co. v. S.M.W. Development Corp, 392 F.2d 380, 384 (2d Cir. 1968). The seminal case on amendment of pleadings, Foman v. Davis, 371 U.S. 178, 182 (1962) still sets the applicable standard -- amendments should be liberally granted. While the Supreme Court certainly recognized that it is within the district court's discretion to deny a motion to amend where the court finds good reason, such as undue delay, bad faith, dilatory motive, prejudice to the opposing party, or futility of the amendment, the "outright refusal to grant the leave without any justifying reason appearing for the denial is ... an abuse of discretion." Foman 371 U.S. at 182. There is not a single reason in this case to deny the simple amendment the Government requests here.

The proposed amendment simply seeks to add a claim for declaratory judgment pursuant to 28 U.S.C. § 2201 that title to the defendant-in-rem coin belongs to the United States. The issues that need to be resolved to determine this claim are identical to certain issues in the forfeiture claims: that the 1933 Double Eagle $20 gold coin has at all times been the

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[2] This is the principle for which the Government cited Conley v. Gibson, 355 U.S. 41, 48 (1957) in our January 26 letter.

property of the United States and that because the coin was stolen from the United States, Fenton did not and could not have acquired legal title or any valid possessory interest in the coin, whether or not he acquired it in good faith.[3]

The proposed amendment does not inject any new issues into the case. The issue of which party holds title to the coin is basic to the forfeiture allegations already alleged. Fenton does not, and could not, claim "surprise" at this allegation. In fact, he spent a significant portion of discovery inquiring into the circumstances under which the coin was removed from the United States Mint in the 1930's and he very familiar with the Government's claim that the coin belongs to and was stolen from the United States. Fenton does not and cannot proffer a single additional topic, document, or question, he would seek in discovery relating to the proposed amendment. Fenton does not and cannot claim that the proposed amendment will delay this action in any way. Nor does he claim that the proposed amendment will cause him to expend any additional resources. The proposed declaratory judgment claim does not raise new facts and does not raise the specter of additional discovery, and there is thus no prejudice to Fenton at all in having it now included in the case.

Searching for something to say in opposition, Fenton suggests that there is some prejudice to him because while he

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[3] While the Government's proof will show that Mr. Fenton was not a bona fide purchaser in good faith, that issue is not relevant to the declaratory judgment claim. See United States v. Barnard, 72 F. Supp. 531, 532-3 (W.D. Tenn 1947).

stands as a claimant with respect to the forfeiture claims, he would be a defendant with respect to the Declaratory Judgement claim. (Fenton's Feb. 16 Letter p. 11-12). The Government fails to see how this distinction can be described as prejudicial. Indeed, in the Declaratory Judgment claim the Government bears the burden of proof by a preponderance of the evidence, whereas in the forfeiture claim the Government must make a threshold showing of probable cause (a lesser standard than preponderance of the evidence and a showing the Government has clearly made), and then the burden shifts to Fenton to prove his defense by a preponderance of the evidence. Thus, it is difficult to see how Fenton is "prejudiced" simply by being in the role of "defendant" as opposed to "claimant.

Fenton further argues that he is "prejudiced" because the proposed amendment takes away an "innocent owner" defense. (Fenton's Feb. 16 Letter p. 12). This argument makes no sense. The addition of a declaratory judgment claim does not remove the "innocent owner" defense for the forfeiture claims. Moreover, legal ownership of the coin is the central issue on the declaratory judgment claim, thus, Fenton will have an opportunity to litigate the issue of superior title and valid legal ownership in the context of both claims.

Fenton also argues that leave to amend should be denied because, he says, the proposed declaratory judgment claim would be redundant of the forfeiture claims and therefore "futile." (Fenton's Feb. 16 letter at 13). While the issues relating to

ownership raised by the declaratory judgment claim do overlap with the issues in the forfeiture claims, there can be no question that they are separate, distinct and viable claims. The declaratory judgment claim seeks a ruling that the Government is the true, rightful title owner of the coin and has therefore has right of possession as against all others. This claim is not redundant of the Government's claim under the forfeiture statutes that the coin is forfeitable because it was imported into the United States by means of a false or fraudulent statement and because it was transported in interstate and foreign commerce with knowledge that it was stolen property.

Fenton's letter further suggests that the Government's request for leave to amend is a "desperate" attempt to correct deficiencies in its existing complaint and that the Government has amended before and should have "corrected" the deficiencies earlier. (Fenton Feb. 16 Letter p. 8-9). First, as is evident from our January 26, 1999 letter, the forfeiture claims in this case are more than adequately plead, and the evidence supporting those claims is overwhelming. There is no "defect" or insufficiency in the case, and the proposed Third Amended Complaint does not change a single word of the forfeiture allegations. Second, the Government's previous amendments to the complaint were not, as Mr. Fenton incorrectly asserts, made to "correct" defects, but rather were voluntarily made as an accommodation to Mr. Fenton who had requested additional specificity. By letter dated August 26, 1996 AUSA Evan Barr

wrote to the Court expressing the Government's view that "as a matter of law, the allegations in the First Amended Complaint plainly suffice to state a claim," and that the "false statement at issue is sufficiently alleged with particularity." Nonetheless, the Government offered to file a proposed Second Amended Complaint to address certain objections made by Mr. Fenton. The letter is attached as Exhibit C to Mr. Berke's January 19, 1999 Letter. Thus, the previous amendments -- which were in any event extremely minor -- were not implemented to correct any "defects" and it is inaccurate for Fenton to mis-portray them as such.

Lacking any colorable claim that there is real prejudice to him from the proposed amendment, Mr. Fenton pads his letter with cites to cases -- mostly from other jurisdictions -- in an attempt to argue that he does not need to show any prejudice and that the Government's request should be denied solely because of the passage of time between the commencement of the action and the request to amend. However, courts in the Second Circuit have held consistently that delay, in and of itself, where there is no real prejudice resulting from the delay, is not adequate reason for denying an otherwise appropriate motion to amend. United States v. Continental Illinois National Bank and Trust, 889 F.2d 1248, 1255 (2d Cir. 1989) (reversing lower court's denial of motion to amend where there was long delay, but no surprise and no showing of "significant prejudice"); State Teachers Retirement Bd. v.

Fluor, 654 F.2d 843, 856 (2d Cir. 1981) ("Mere delay ... absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend."); Middle Atlantic Utilities Co. v. S.M. Development, 392 F.2d 380, 384 (2d Cir. 1968) ("unless the motion either was made in bad faith or will prejudice defendant, delay by itself is not enough to deny the requisite relief."); see also Deere v. Goodyear Tire and Rubber Co., 175 F.R.D. 157, 165 (N.D.N.Y. 1997); Town of New Windsor, v. Tesa Tuck, Inc., 919 F. Supp. 662, 675-677 (S.D.N.Y. 1996) (long delay is not a sufficient reason to deny a motion to amend); Expoconsul International v. A/E Systems, 145 F.R.D. 336 (S.D.N.Y. 1993) (leave to amend granted even though 5 years passed since commencement of the action, and 5600 pages of deposition testimony, because "delay alone does not provide sufficient justification for the denial of a motion to amend").[4]

As the Second Circuit noted in State Teachers Retirement Bd., this is not a case where the proposed amendment has come on the eve of trial, there are no new problems of proof introduced as a result of the amendment, no trial date has been set, and no dispositive motions have been filed. 654 F.2d at 856. Moreover, the Government's proposed amendment requires no

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[4] Fenton incorrectly cites Zahra v. Town of Southold, 48 F.3d 674 (2d Cir. 1995) for the proposition that leave to amend should be denied based solely on the timing of the Government's motion. (Feb. 16 letter p. 10). However, in Zahra the Court affirmed a denial of a motion to amend where the request to amend was made only three months before trial and the proposed amendment was futile.

additional discovery[5] and would not in any way delay the progression of this case. There is no prejudice whatsoever.

Every one of the cases from this Circuit cited by Mr. Fenton are easily and markedly distinguishable from the facts here. There were prejudicial factors present in all of those cases that are simply not present here. For example, in Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir. 1990) the motion to amend was made at least one month after a motion for summary judgment had been filed and the court found that the adverse party was in fact prejudiced. In Gravatt v. Columbia University, 1992 WL 67650 at *7 (S.D.N.Y. 1992), the court denied the motion to amend because the proposed amendment was futile. Similarly, in State of New York v. Cedar Park Concrete Corp., 741 F. Supp. 494, 496 (S.D.N.Y. 1990), a motion to amend to add damages claims was denied where, among other things, the motion was made a full two years after the court had dismissed damages claims without prejudice to replead within 60 days. And in Smith v. City of New York, 611 F. Supp. 1080, 1093 (S.D.N.Y. 1985) the court denied leave to amend where, among other things, discovery had been closed, the request was made on the eve of trial, the proposed amendments would require substantial additional discovery, the defendants would be prejudiced by the additional discovery and trial preparation, and at least one of the proposed

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[5] Even if more discovery were required, "the adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading." Continental Illinois, 889 F.2d 1248, 1255.

claims was without merit. Finally, in Evans v. Syracuse City School Dist., 704 F.2d 44 (2d Cir. 1983) the motion to amend w filed only 6 days before trial.

Mr. Fenton also cites to a dozen or so cases from ot Circuits, none of which are applicable. Those cases all invol prejudicial and aggravating factors not present here. For example, in Whitaker v. City of Houston, 963 F.2d 831, 836 (5t Cir. 1992) a motion to amend was filed after the complaint was dismissed. Texaco, Inc. v. R. Ponsoldt, 939 F.2d 794, 798 (9t Cir. 1991) involved a motion to amend filed eight months after summary judgment had been granted. Similarly, Anderson v. USA 619 F. Supp. 1191 (D.D.C. 1985) held that the proposed amendme was prejudicial to the adverse party as it was filed after dispositive motions had been filed. And in Westlands Water District v. Firebaugh Canal, 10 F.3d 667, 677 (9th Cir. 1993) motion to amend was filed after the original complaint had bee dismissed. Here, no trial date has been set, no dispositive motions have been filed or granted nor will the proposed amendment cause any delay in the setting of a trial date or th filing of such motions should they become appropriate at some point in the litigation.[6]

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[6] The other non-Second Circuit cases cited in Mr. Fenton's papers are equally inapposite. Several involved moti to amend filed literally on the eve of trial. Kaplan v. Rose, F.3d 1363, 1370 (9th Cir. 1995) (the Court recognized the "str policy in favor of allowing amendment" yet upheld denial of a motion to amend where trial was only two months away, protract discovery had been completed and there was real prejudice to t adverse party; Pope v. MCI Telecommunications Corp., 937 F.2d 258, 263 (5th Cir. 1991) (motion to amend was filed less than

## Conclusion

In short, there is no prejudice or even slightly adverse effect arising out of the Government's proposed amendment. Accordingly, the Government respectfully requests leave of the Court to serve and file a Third Amended Complaint to include a cause of action for declaratory judgment that the United States is and has at all times been the true title owner of the coin and has a valid, superior ownership and possessory interest in the coin.

Very truly yours,

MARY JO WHITE
United States Attorney

By: Jane A. Levine
Jane A. Levine
Assistant United States Attorney
Telephone: (212) 637-1063

cc: Barry Berke, Esq.

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week before trial, long after extensive discovery had taken place and the amendment would have subjected the adverse party to prejudice); First City Bank v. Air Capitol Aircraft Sales, Inc., 820 F.2d 1127, 1132 (10th Cir. 1987) (the motion to amend was filed on the eve of trial and the trial court found that it would have opened up large discovery matters); Perrian v. O'Grady, 958 F.2d 192, 195 (7th Cir. 1992) (the court noted that "delay in itself does not constitute a sufficient basis for denying a motion to amend," but upheld the denial of the motion because the motion was filed on the eve of trial and would have delayed the case). Other cases cited by Fenton involved parties seeking some improper tactical advantage from the amendment, a factor clearly not present in this case. See Johnson v. Methodist Medical Center, 10 F.3d 1300 (7th Cir. 1993) (motion to amend denied where the proposed amendment was filed after plaintiff realized she would lose on original claims, where defendant was taken by surprise, and new claims involved substantial additional discovery, all of which was prejudicial); Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc., 690 F. 2d 1157, 1163 (5th Cir. 1982) (court recognized the "bias in favor of granting leave to amend" and upheld denial where the amendment appeared to proposed for the purpose of "judge shopping").



TOTAL P.1

**U.S. Department of Justice**

*United States Attorney*
*Southern District of New York*

*The Silvio J. Mollo Building*
*One Saint Andrew's Plaza*
*New York, New York 10007*

January 26, 1999

Honorable Alvin K. Hellerstein
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York

Re: United States v. One $20 Gold Coin, Known as a 1933 "Double Eagle," Minted at the United States Mint in Philadelphia, Pennsylvania, 96 Civ. 2527 (AKH)

Dear Judge Hellerstein:

The Government respectfully submits this letter in support of its request that the Court compel Stephen Fenton, the claimant in the above matter, and Jasper Parrino, a third party witness, to either appear for depositions under the terms of immunity offered by the Government in our December 4, 1998 letter, or to formally assert for the remainder of these proceedings a Fifth Amendment right not to incriminate themselves. The Government also opposes Fenton's request for permission to file a summary judgment motion before resolution of this discovery/Fifth Amendment question. The Government respectfully submits that all dispositive motion practice by either side should be deferred until the Government takes Fenton's and Parrino's depositions, or until after they commit to forgo testifying based on their invocation of the Fifth

Amendment.

1. **DESCRIPTION OF THIS ACTION**

This is a civil forfeiture case brought by the Government seeking the return to the United States of a rare -- perhaps the rarest -- United States gold coin, a 1933 $20 Double Eagle. The coin at issue in this case is one of several stolen from the United States Mint in Philadelphia sometime in the 1930's. The defendant-in-rem 1933 Double Eagle $20 gold coin is, and has at all times, remained the property of the United States Government, and this action is to forfeit and return the coin to its rightful owner and title holder.

The core facts are set forth in the Second Amended Complaint, which is annexed hereto as Exhibit A. In early 1933, approximately 445,000 Double Eagle $20 gold coins were minted. However, not a single one of these gold coins was ever circulated or made legal tender of this country. In early 1933, President Franklin Delano Roosevelt took the United States off the gold standard and essentially prohibited gold coinage.[1] Under applicable United States Mint policy and procedure coins did not become circulated and issued until the Mint received an order from Treasury; thus, no 1933 Double Eagle $20 gold coin could

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[1] On April 5, 1933 President Roosevelt issued Executive Order 6102 requiring the return to the United States Government of all gold, with the exception of gold coin and certificates in an amount not exceeding $100 and gold coins having recognized special value to collectors of rare and unusual coins. Executive Order 6102 was followed by other Executive and Treasury Orders, and by the Gold Reserve Act of 1934, all of which effectively prohibited gold coin.

have been legally issued for circulation by the United States Mint without an order from the Treasurer so directing. With the Roosevelt administration's gold policy and the executive order directing the return to the Government of all gold coin, the Treasurer of the United States did not issue an order placing the 1933 Double Eagle $20 gold coins into circulation.

In fact, all of the 1933 Double Eagle $20 gold coins that had been minted were ordered melted down into gold bullion, except for two specimens that were sent to the Smithsonian Institute for display in the numismatic collection, and twenty-nine, which were sent to the Assay Commission for testing and later ordered destroyed. Thus, no 1933 Double Eagle $20 gold coin was ever issued or circulated, no such coin became or has ever become legal tender or currency of the United States, and therefore any existing 1933 Double Eagle $20 gold coin -- including the defendant-in-rem coin -- is the property of the United States.

What gives rise to this case is that before the 1933 Double Eagle $20 gold coins were melted down, several were stolen from the Mint. The theft of these gold coins was discovered years later, when certain private coin collectors advertised the availability of 1933 Double Eagles for sale. In about 1944, the United States Secret Service ("U.S.S.S.") conducted an extensive investigation into the fraudulent removal of the 1933 Double Eagle $20 gold coins from the U.S. Mint. The investigation developed very strong evidence that the coins were unlawfully

removed from the Mint by the Cashier at the time, George McCann, who was convicted in 1940 of theft of other coins from the Mint. (See Exhbit B, Doc No. 779-784).[2] By the mid-1940's the U.S.S.S. had succeeded in recovering and forfeiting as property rightfully belonging to the United States eight 1933 Double Eagle $20 gold coins from various private persons. Id.

Several of the recoveries were accomplished through litigation involving issues and facts nearly identical to those presented here. For example, in United States v. Barnard, 72 F. Supp. 531 (W.D. Tenn. 1947), the United States brought a civil replevin action to recover a 1933 Double Eagle $20 gold coin from L.G. Barnard, a coin collector. Barnard had purchased the coin in 1944 from a reputable collector. The Government raised essentially the same allegations as it does here: the 1933 Double Eagle coins were minted, but never legally circulated or issued and therefore the coins were illegally removed from the Mint and constitute Government property, not currency. Barnard claimed that he was a bona fide purchaser without any knowledge or notice that the coin had been stolen, that the coin was not chattel, and he was therefore entitled to have it returned to him. 72 F. Supp. 531.

The Court in Barnard reviewed the same facts discussed above regarding the minting of the 1933 Double Eagles, President

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[2] The Government does not need to prove in this forfeiture action who stole the coins. The Government's burden is to demonstrate probable cause to believe that the coins were stolen, knowingly transported in commerce or imported by means of a false statement.

Roosevelt's executive orders and subsequent legislation prohibiting the coinage and payment of gold coin, and the melting down of the coins into bullion. Barnard, 72 F. Supp. at 532. The Court concluded that "it is clear that the gold piece which is the basis of this law suit did not leave the Mint as regularly and lawfully issued money, or currency." Id. The Court went on to say that, "it is a fair inference, from the proof in this case, that the Double Eagle here involved was taken out of the Mint in an unlawful manner." Id. The Court concluded that:

> Since the gold piece was stolen or, through fraudulent breach of trust, taken from the Philadelphia Mint, the defendant, as the purchase, took the same subject to the defects in its title and this is true, even though the property was acquired in good faith, for a valuable consideration and without notice of any infirmity of title. He cannot maintain ownership in such property against one who has been deprived of it by theft or other illegal act.

72 F. Supp. at 532-3. The Court awarded the coin to the United States.

A. The Seizure of the Defendant-in-rem Coin

It is against this backdrop that the Government came to seize the defendant-in-rem coin. The Government's seizure of the Double Eagle $20 gold coin which is the subject of this lawsuit arose out of the following scenario: Jasper Parrino, a Kansas City, Missouri coin dealer was speaking with another coin dealer, Jack Moore, about the possible sale of a 1933 Double Eagle $20 gold coin. Moore recognized the 1933 Double Eagle as a coin that was illegal to own, as any knowledgeable United States coin dealer would, and told the Government. Moore began acting as a

United States Secret Service confidential informant, and as such ultimately agreed that Parrino and his seller would receive a price of $1.5 million for the coin. (Cpl. ¶ 12-15).

During their discussions regarding the transaction, Parrino informed Moore, among other things, that the coin and the seller were overseas, and that the seller was reluctant to bring the coin into the United States because "it is okay over there, but it's not okay over here." (Cpl. ¶ 15, 16). The seller (who we now know was Fenton) ultimately agreed to come to the United States for more money.

On February 8, 1996, a meeting took place at the Waldorf Astoria Hotel in Manhattan, where Parrino and Stephen Fenton provided the 1933 Double Eagle $20 gold coin to Moore and a Secret Service Agent posing as a coin expert. (Cpl. ¶ 23). During this meeting, which was consensually recorded on video and audio tape, Parrino asked, among other things, how the value of the coin would be affected in the event the transaction were "legalized." Fenton's reply reflected his knowledge of what was going on, as he stated, in substance and in part, that it would double the value. (Cpl. ¶ 23).[3]

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[3] As a result of these events, the Government filed a Criminal Complaint (96 Mag. 229), charging Fenton and Parrino with conspiring to embezzle, and convert to their use property belonging to the United States in violation of 18 U.S.C. § 371. On April 10, 1996, the Government moved to dismiss those charges without prejudice. There are no pending criminal charges against either Fenton or Parrino relating to the coin.

B. **Forfeiture Claims**

The defendant-in-rem coin is subject to forfeiture, pursuant to 18 U.S.C. §§ 545 and 981(a)(1)(C) and 19 U.S.C. § 1595a(c), because there is probable cause to believe that it was introduced into the United States by means of a fraudulent or false statement. Specifically, Fenton's authorized Custom's broker/agent represented on a United States Customs Form (Exhibit that Fenton was importing only "legal tender U.S. Gold Coins Minted by the United States Government between 1830 and 1932," when Fenton was knowingly importing into the United States a Double Eagle $20 gold coin minted in 1933, never made legal tender, stolen from the Mint and which belonged to the United States. The defendant-in-rem coin is further subject to forfeiture pursuant to 19 U.S.C. § 1595a(c) because there is probable cause to believe that it is property stolen from the United States Mint, and knowingly transported in foreign commerce.

C. **Forfeiture Procedure**

The above cited statutory provisions (like most of the forfeiture statutes) incorporate the procedures set forth in the Customs laws, which require the Government to show probable cause to forfeit the property. 19 U.S.C. § 1602-1621. The Government's probable cause burden is satisfied upon a showing of "reasonable grounds" to believe that the property is subject to forfeiture, a showing that one supported by more than "mere suspicion." See Marine Midland Bank, N.A. v. United States , 11

F.3d 1119 (2d Cir. 1993). The Government may establish probable cause by direct and/or circumstantial evidence. In addition, otherwise inadmissible, yet reliable, hearsay evidence may be used by the Government to demonstrate probable cause.

Once the Government makes that showing, the burden shifts to the claimant to defend the property by a establishing by a preponderance of the evidence that the property is not subject to forfeiture because the Government has not demonstrated probable cause or because the claimant is an "innocent owner."[4] Thus, the burden of proof in civil forfeiture actions shifts to the claimant once the Government establishes probable cause to forfeit the property. 19 U.S.C. § 1615.

**2. FENTON SHOULD BE COMPELLED TO EITHER ACCEPT THE GOVERNMENT'S OFFER OF IMMUNITY, OR TO INVOKE THE FIFTH AMENDMENT**

In his January 19, 1999, Fenton asks this Court to issue an order dismissing the Government's case unless we provide Fenton with complete immunity from prosecution. In the alternative, Fenton asks this Court to defer ruling on the application until after he files a summary judgment motion. For the reasons below, the application should be denied.

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[4] In this case, Fenton could not prevail on an "innocent owner" defense, not only because he acted knowingly with respect to the transportation of stolen property and the false statement to Customs, but also because he cannot on the undisputed facts establish that he is the valid legal "owner" of the coin, even if he could refute knowledge.

A. **Fenton's and Parrino's Immunity Request, and the Government's Voluntary Offer of Immunity**

The Government served notices for the depositions of Fenton and Parrino on October 10, and 11, 1996, respectively. Neither deposition has taken place to date, however, as they have been adjourned pending the parties' attempt to resolve without motion practice Fenton's request for immunity and/or a protective order to accommodate his Fifth Amendment interests.[5] The Government served its First and Second Set of Interrogatories to Claimant on February 26, 1997 and April 1, 1997, respectively. Request No. 3 of the Government's First Set of Interrogatories requested production of documents. On April 14, 1997, Fenton asserted the attorney-client and Fifth Amendment privileges as a basis for not providing answers to certain of the Government's requests, including the request calling for documents.

The Government initially opposed offering any kind of immunity to Fenton or Parrino. However, we asked Mr. Berke to defer filing a formal motion pending our reconsideration of the issue. After deliberating over the request internally, in October 1998, the Government informed Mr. Berke that it would be prepared to offer some type of immunity. Before the written offer was sent, the parties agreed to a deposition date for Fenton of December 9, 1998. By letter dated December 4, 1998, the Government offered the following terms of immunity:

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[5] Parrino has joined in Fenton's request and the Government has informed Parrino's counsel that it would extend to Parrino the same level of immunity offered to Fenton.

> As you know, the Government has dismissed its criminal charge against Mr. Fenton, and we have informed you that there is no present intention to charge Mr. Fenton with any crimes arising out of his importation, transportation, possession or sale of the gold coin that is the subject matter of the above-referenced litigation. We further agree that, in the event that this Office does prosecute Mr. Fenton for such a crime, we will not offer into evidence during the Government's direct case-in-chief any testimony Mr. Fenton may give in the pending civil action.

(The full letter is annexed as Exhibit K to Berke's January 19 letter). However, Fenton refused to appear for the deposition on the ground that he was not satisfied with the terms of the immunity letter. He instead has demanded as a precondition to his providing discovery in this case what is sometimes referred to as "transactional immunity," an unconditional certification and guarantee from the Government that he will not ever be prosecuted for any offense related to the 1933 Double Eagle coin. (Berke Jan. 19 letter p. 11).

Fenton's position is untenable and without a shred of legal support. The Government's December 4 letter accommodates Fenton's Fifth Amendment rights to the fullest extent required under Second Circuit law. The Government has dismissed the criminal charges and has represented many times that there is no active criminal investigation in this Office relating to the coin transaction. Thus, Fenton's professed concern regarding self-incrimination is entirely theoretical. Further, the Government's December 4 letter provides greater protection than is ordinarily provided a civil litigant in similar circumstances. The typical confidentiality or third party protective order merely dictates

that transcripts and other statements be filed under seal and restricted for access to third parties. Here, the Government has affirmatively immunized the testimony, making it clear and explicit that we would not use it directly against Fenton in a criminal proceeding relating to the coin. Fenton is not entitled to the extraordinary relief he seeks here -- an order dismissing the Government's case unless Fenton is given unconditional immunity from prosecution.[6] Fenton must be directed to either invoke a Fifth Amendment right to remain silent for the duration of these proceedings, or to testify pursuant to the terms of immunity the Government has voluntarily offered.

The leading Second Circuit decision addressing the question of how to district courts should deal with a witness's invocation of the Fifth Amendment privilege within civil forfeiture actions is United States v. Certain Real Property and Premises known as: 4003-4005 5th Avenue, Brooklyn, New York, 55 F.3d 78 (2d Cir. 1995) (hereinafter "Certain Premises"). In that case, the Government brought a civil forfeiture action against premises involved in narcotics trafficking. The claimant had been convicted of federal narcotics charges. In response to the Government's discovery requests, the claimant invoked the Fifth amendment privilege against self-incrimination. The Government then moved for summary judgment, contending that the Government

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[6] The judicial branch cannot confer immunity from prosecution on a witness, as "immunity remains preeminently a function of the Executive Branch." United States v. Salerno, 937 F.2d 797, 807 (2d Cir. 1991). Thus, Court could not directly immunize Fenton from prosecution.

had satisfied its initial burden to establish probable cause, and that the claimant had not put forth any evidence to satisfy his burden of demonstrating a defense. In an attempt to defeat summary judgment, the claimant sought to withdraw his prior assertion of the Fifth amendment privilege and to submit an affidavit creating a question of fact. The district court rejected the affidavit, and held that the claimant could not submit any material previously withheld on the basis of the privilege. 55 F.3d 78, 81.

The Court of Appeals upheld the district court's ruling. The Court agreed with the district court's analysis that the claimant's invocation of the privilege against self-incrimination had hindered the Government's discovery efforts, and that it was an abuse of the discovery process for claimant to seek to waive or deny the existence of the privilege on the eve of trial or equivalent thereof. 55 F.3d 78, 85. The Court held that the delay caused by plaintiff's invocation and the timing of his attempt to withdraw the privilege could reasonably be viewed as prejudicial to the Government, and thus, the district's court's ruling excluding material previously withheld as within privilege was reasonable and appropriately tailored. 55 F.3d 78, 86.

In reaching this conclusion, the Court of Appeals acknowledged that the "tension between self-incrimination concerns and the desire to testify may be especially acute for a claimant in a civil forfeiture proceeding." Id. at 83. Where the

claimant may also be subject to parallel criminal proceedings based on the same factual allegations as those supporting forfeiture of property involved in crime, there is a dilemma: remain silent and risk the forfeiture, or testify and risk making incriminating statements. Id. The Court recognized that, although there is no question that an individual has the right to invoke the Fifth amendment in a civil proceeding, assertion of the privilege is not without cost. In a civil forfeiture proceeding, for example, a claimant asserting the privilege still bears the burden of proof to demonstrate that the defendant property was not derived from criminal activity or that he has an "innocent owner" defense. Id. at 83; see also United States v. Rylander , 460 U.S. 752, 758 (1983). In addition, invocation of the Fifth Amendment privilege permits the opposing party to ask the trier of fact to draw a negative inference from the claimant's silence. Certain Premises, 55 F.3d at 82-3.

The Court of Appeals for the Second Circuit in Certain Premises thus encouraged district court's to make efforts to "accommodate" both the witness's Fifth amendment privilege and the legislative intent behind the forfeiture laws. 55 F.3d 78, 83. The Court stated that district courts:

> should seek out those ways that further the goal of permitting as much testimony as possible to be presented in the civil litigation, despite the assertion of the privilege....the court should explore all possible measures in order to `select that means which "strikes a fair balance ... and ... accommodates both parties."'

Id. at 84, citing United States Currency, 626 F.2d 11 (6th Cir.

1980). Thus, Certain Premises speaks of "balance," "accommodation" and "fairness to both sides," and cannot be read to approve of the Fenton's lopsided and extraordinary request for immunity from prosecution.

Further, the Court in Certain Premises recognized that the particular form of accommodation adopted in each case will necessarily vary. Certain Premises, 55 F.3d 78, 84, n.6. Among the options the Court expressly noted are: i) a protective order prohibiting the use of the civil litigant's testimony in any criminal proceeding in that district; ii) staying the civil action until parallel criminal proceedings have run their course, or until the statute of limitations has run on the criminal conduct; or, iii) attempting to arrange for some type of immunity so that a civil litigant would not be criminally prosecuted based upon the statements made in the civil litigation. Id.

It is plain that the Government's December 4 letter is entirely within the letter and spirit of Certain Premises. The letter is more than a protective order, as it provides explicitly that testimony would not be used directly against Fenton in any criminal prosecution relating to the coin. Fenton could not even hope to achieve more from a motion. No where does the Court of Appeals in Certain Premises state that a district court should dismiss the Government's case unless the Government provides the claimant with unconditional, blanket, transactional immunity from criminal prosecution.

On the contrary, Certain Premises cites approvingly to

United States v. Talco Contractors, 153 F.R.D. 501 (W.D.N.Y. 1994), a case in which the district court expressly rejected a witness' request for the identical relief sought by Fenton here. "[T]he claim that deposition testimony will be incriminating [cannot] be interposed as a reason to inconvenience the opposing litigant with a dismissal of its action or other sanction for failing to seek immunity." Talco at 508, cited in Certain Premises, 55 F.3d at 84, n. 6.[7]

Fenton cites to a Sixth Circuit case, United States v. U.S. Currency, 626 F.2d 11 (6th Cir. 1980), as support for his request that this Court should "dismiss" the Government's case unless the Government immunizes Fenton from prosecution. However, in U.S. Currency, the Court of Appeals for Sixth Circuit held the opposite -- the district court's dismissal of a forfeiture action was reversed, with the Court stating, much the same as the Second Circuit stated in Certain Premises, "the courts must seek to accommodate both the constitutional right against self-incrimination as well as the legislative intent behind the forfeiture provisions." 626 F.2d 11, 15.

The immunity that the Government has offered Fenton in this case is precisely the kind of accommodation envisioned in Certain Premises. First, this Office has represented to Fenton

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[7] In Talco the Government opposed issuance of any kind of protective order, and the Court agreed with the Government, holding, "naked desire to avoid prosecution ... is not sufficient good cause in itself to warrant issuance of a protective order." Talco, 153 F.R.D. at 514. In this case, the Government has voluntarily offered Fenton the very relief which, under Talco the Government could have legitimately opposed.

that there presently is no pending, active criminal investigation relating to the coin. The December 4 immunity letter further accommodates Fenton's Fifth Amendment concerns by providing that his discovery responses and testimony will not be used directly against him in a criminal prosecution. At the same time, the letter accommodates the Government's interests in prosecuting this forfeiture action and in having an opportunity to take critical discovery. Fenton has absolutely no entitlement to extract more from the Government. He has no basis to use this lawsuit as a wedge to demand immunity against all theoretical possibility of criminal prosecution relating to coin. That would hardly fulfill the goal of weighing the competing interests with a view to striking a fair balance and accommodating both sides. Certain Premises, 55 F.3d at 84. While there is no dispute that Fenton cannot be compelled to testify against his will if doing so would violate his Fifth Amendment right against self-incrimination, he can and must be directed to now choose between invoking the privilege for the remainder of this case, or accepting the immunity letter offered by the Government.

A significant portion of Fenton's argument regarding the immunity issue is directed to a discussion of the negotiations that have taken place between the parties on this issue. Fenton attempts to portray the Government as having "changed" its position to his detriment. (See Berke Jan. 19 letter pp. 7-10). The Government has indeed changed its position -- in Fenton's favor! As Fenton accurately reports, the

Government initially opposed his request for any kind of protective order. That view is not without support in the case law. See United States v. Talco Contractors, Inc., 153 F.R.D. 501 (W.D.N.Y. 1994). However, the Government reconsidered its position at Fenton's request, and ultimately voluntarily and without requiring Fenton to file a motion, decided to fully immunize Fenton's testimony in this case.

Mr Berke also accurately reports that the Government initially explored with the Department of Justice ("DOJ") the possibility of obtaining a traditional "compulsion" order as provided for in 18 U.S.C. § 6002 and 6003. However, upon reflection and consultation with DOJ, it became clear that this statutory immunity provision did not apply where, as here, the witness, not the United States, seeks immunity, and where the purpose of the immunity is not to further the public interest in pursuing a criminal prosecution, but to permit a civil litigant to prosecute a private claim. DOJ refused to approve a "compulsion" order and suggested, that, if we were inclined to offer any immunity at all, to provide it in a letter issued by this District.

The Government informed Mr. Berke that it would do as DOJ suggested: provide Fenton with an immunity letter issued by this District. I told Mr. Berke that I believed the letter would look like a non-prosecution agreement. However, I also expressly told him that the precise language had to be reviewed and approved by various supervisors in the Office, as is typically

required where the Government extends immunity to a witness under unusual circumstances such as these. After Mr. Berke rejected the Government's letter, he informed me that his client would not appear for the deposition unless the Government expanded the immunity language in various ways, all unacceptable to the Government. The parties attempted to schedule an immediate conference with Judge Martin, however, he had just reassigned the case to this Court. Unfortunately, this dispute arose at a time when this Court was also unavailable for an immediate conference. The issue was not resolved and the deposition did not take place.[8]

Thus, Fenton has suffered no prejudice from the manner in which this dispute has progressed. On the contrary, the Government has had no discovery during the pendency of this dispute, while Fenton has taken the depositions of nine witnesses and has received full document discovery.

### 3. FENTON'S REQUEST FOR PERMISSION TO FILE A SUMMARY JUDGEMENT MOTION BEFORE RESOLUTION OF THE IMMUNITY/FIFTH AMENDMENT ISSUE SHOULD BE DENIED

Fenton suggests in his January 19 letter that the Court could, in the alternative, "defer" ruling on the immunity/Fifth

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[8] We note that Fenton's deposition was scheduled for December 9 at his request. The Government was available earlier, but Fenton told the Government and Judge Martin at the October 1 conference that his client was very busy traveling to various places for business, that he would be in the United States for other business in December and wanted to combine the deposition with that other business. Thus, Fenton did not make a special trip to this country expressly for the deposition.

Amendment question until after he files a motion for summary judgment, leaving open the possibility that if Fenton loses, he could then decide whether to give it another try by testifying on his own behalf. That is precisely the kind of abusive and prejudicial invocation of the Fifth Amendment foreclosed by the holding of Certain Premises.

No dispositive motion should be filed until after the Government either takes discovery, or until after Fenton and Parrino formally invoke the Fifth Amendment for purposes of this proceeding. The Court in Certain Premises instructed district courts to be mindful of the danger that litigants could use the Fifth Amendment as a strategic tool to manipulatively invoke and withdraw in a litigation to gain tactical advantage. 55 F.3d at 87. Fenton cannot be permitted to use the Fifth Amendment to shield himself from providing any discovery in the case, while preserving the right to "withdraw" the privilege in the event he loses a motion for summary judgment. Certain Premises, 55 F.3d 78, 87; United States v. Talco Contractors, Inc, 153 F.D.R. 501, 506 (W.D.N.Y. 1994); see also United States v. Private Sanitation Industry Ass. of Nassau/Suffolk, 914 F. Supp. 895, 899 (E.D.N.Y. 1996). Thus, Fenton may not "defer" his decision on whether to testify until after he takes a stab at summary judgment.

**A. Fenton's Proffered Defenses Have No Merit**

Dispositive motions in this case are further inappropriate because none of the proffered defenses discussed in Mr. Berke's January 19 letter have any merit and would not

dispose of the case on a summary judgment motion. While full briefing of these issues is reserved for the appropriate stage, below is a brief response to defenses raised in Mr. Berke's January 19 letter.

i. "King Farouk" Defense

Fenton contends that the Government has somehow "waived" its interest in the defendant-in-rem 1933 Double Eagle gold coin because in 1944 an export license was granted to permit King Farouk of Egypt to take one such coin out of the country. Fenton could not meet his burden on summary judgment based on this argument.

King Farouk of Egypt was a rare coin collector. In 1944, an export license was granted to permit the Egyptian royal legation to export one 1933 Double Eagle $20 gold coin for King Farouk's collection. The employee who had "approved" the license was the curator of the Smithsonian Institute, who had no knowledge that the 1933 Double Eagles had been stolen from the Mint. The approval was given in error. In a matter of weeks after the 1933 Double Eagle $20 gold coin had actually left the country, the Acting Director of the Mint recognized that a mistake had been made, and steps were taken to get the coin back. (See Exhibit C, Bates No. 898-99). In 1952, the United States learned that the "royal" coin collection was going to be auctioned, and the Government requested that the coin be returned to the United States. (Exhibit D, Bates Nos. 960 and 963). The coin was withdrawn from auction, but unfortunately was never

returned to the United States. It's whereabouts today are unknown.[9]

Thus, the fact that one 1933 Double Eagle was mistakenly exported in 1944 to the Egyptian monarch does not establish as a matter of law that the United States Government has relinquished and waived its right to seek return of either the King Farouk coin, or other 1933 Double Eagle $20 gold coins stolen from the United States Mint, including the one in this lawsuit. It certainly does not establish that the Government has somehow authorized private possession of all 1933 Double Eagles, as Fenton contends.

ii. Neither The 1954 Treasury Order Nor the 1965 Coin Legislation Provide a Defense to This Action

Fenton further suggests that, even if the Government demonstrates probable cause to believe that no 1933 Double Eagle $20 gold coin left the Mint legally, the Government nonetheless has "surrendered" its title to the coins by virtue of a 1954 Treasury Order (attached as Ex. F to Berke's Jan. 19 letter) that ended the prohibition on private ownership of gold coin. Fenton's reliance on the 1954 Treasury Order is completely misplaced.

The 1954 Treasury Order was issued, as the text of the order states, 20 years after the 1933 gold restrictions had gone into effect, at a time when a substantial portion of the gold

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[9] Fenton does not claim and has proffered no evidence that the defendant-in-rem coin is the King Farouk coin.

coin known to have been in circulation when the 1933 restrictions were first imposed had been returned. The Order further recognized that part of the gold coin in circulation in 1933 had been abroad and therefore not within the restrictions, and that it was no longer in the public interest to require examination of all gold coins predating 1933. The Order thus amended the 1933 Treasury order to exempt from the class of prohibited gold coins all gold coin made prior to April 5, 1933.

The 1954 Treasury Order exempting currency from the requirement that it be returned to the Government expressly and logically applies only to gold coin legally circulated and issued as currency. The 1954 Order explicitly refers in its preamble to "coins known to have been in circulation on that date." There is no dispute that the 1933 Double Eagle was never circulated and never issued as U.S. currency, and therefore, the 1954 Order does not apply to it. The defendant-in-rem 1933 Double Eagle was stolen from the United States Mint. It is not in the class of coins contemplated by the Order -- coins that were circulated as currency at one time but for one reason or another were not returned to the United States after President Roosevelt took the country off the gold standard.

Similarly, Fenton's citation to the 1965 Coinage Act (Ex. G to Berke's Jan. 19 letter) offers him no defense. The 1965 Coinage Act simply provides that all United States coins and currency are legal tender regardless of the date of issuance. The Act does not state, and cannot be reasonably interpreted to

imply, that 1933 Double Eagles, which were never issued and were stolen from the Mint, are now legal tender.

iii. **False Statements**

Fenton also argues that the Government could not "in good faith" oppose summary judgment on the Government's false statement claim, in view of the deposition of the Jet Air Customs broker, Larry Baker. Mr. Baker's deposition does not pose an undisputed defense for Fenton. In fact, it supports the Government's claim.

Mr. Baker testified that as Fenton's Customs broker he (through Jet Air) prepared the Customs forms for the importation in which the defendant-in-rem coin came into the country. Mr. Baker testified that the document which falsely described the coins being imported as "LEGAL TENDER U.S. COINS MINTED BY THE UNITED STATES GOVERNMENT BETWEEN 1830 AND 1932," was a boilerplate form that Mr. Baker, not Fenton, had created with assistance from persons knowledgeable about the dates of United States coins. The document was submitted in the place of an invoice to avoid a processing fee. Mr. Baker stated that he had received certain documents from Fenton's coin company in connection with the importation, but they did not contain the above representations about the nature and the dates of the coins. Mr. Baker said that Fenton had been a client of Jet Air's for several years in connection with the importation of coins.

While Fenton did not necessarily complete the Customs forms himself, there is substantial evidence that Fenton knew Jet

Air would use its boilerplate form incorrectly describing the coins as legal tender dated up to 1932, and that by his silence, Fenton caused the false statement to be made. One piece of evidence corroborating Fenton's complicity in the false statements is that at a January 4, 1996 meeting between Jasper Parrino (Fenton's representative) and Jack Moore (the confidential informant), Moore asked Parrino how the coin would be brought into the United States. Parrino told Moore that it would be brought in on a "misdated invoice." (The statement was consensually tape recorded and is also reflected in a contemporaneous Secret Service report (Bates No. 1067), both of which were produced to Fenton in the Government's discovery.) The misdated invoice is precisely how the coin was able to pass through United States Customs without so much as raising an eyebrow. Mr. Thus, Baker's testimony that the form he used was one he had used many times in the past for coin importations supports the Government's false statement claim. Fenton is hardly in a position to move for summary judgment on this claim, particularly before there is a final determination as to whether he and/or Parrino will testify or remain silent.

**4. THE GOVERNMENT SEEKS LEAVE TO AMEND THE COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 15 TO SEEK A DECLARATORY JUDGMENT THAT THE UNITED STATES HAS LEGAL TITLE TO THE COIN**

The Government's complaint presently seeks return of the defendant-in-rem coin under forfeiture theories of recovery. However, the parties have actually been litigating another valid legal theory of recovery available to the Government -- that the

Government is the legal title holder to the coin.[10] Thus, in addition to in rem forfeiture claims, the Government seeks an in personam declaratory judgment against Stephen Fenton, pursuant to 28 U.S.C. § 2201, that the United States has good title to the coin and that Fenton has no title in or other possessory claim. The Government wishes to seek a ruling that, under the applicable law of New York, CPLR Article 71, the 1933 Double Eagle $20 gold coin is and has at all times been the property of the United States, and because the coin was stolen from the United States Mint, Fenton could not have acquired legal title to it, even if he could demonstrate that he was a bona fide purchaser in good faith -- and the Government does not concede that he could ever make that showing.

Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires." "In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be 'freely given.'" Forman v. Davis, 371 U.S. 178, 182 (1962). Generally, amendments are favored "to facilitate proper decision

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[10] This theory is also relevant to defeating Fenton's "innocent owner" defense, as it is the Government's contention that Fenton cannot establish that he is an "innocent owner", because he is not the legal owner of the coin. Rather title to the coin has always remained with the Government.

on the merits." Conley v. Gibson, 355 U.S. 41, 48 (1957); see also McDraw, Inc. v. The CIT Group Equip. Fin.Co., 157 F.3d 956, 962 (2d Cir. 1998).

There is no undue delay, bad faith, dilatory motive or any prejudice whatsoever to Fenton by the proposed amendment. The declaratory judgment claim does not involve the allegation of a single new fact. All the relevant facts pertaining to this cause of action were previously set forth in the Government's Second Amended Complaint. The factual predicate for the proposed amendment -- that the defendant-in-rem coin is not currency, but rather is "chattel" or property belonging to the United States, which was stolen from the United States Mint in the 1930's -- has already been alleged as part of the Government's forfeiture action. Therefore Fenton has had from the very beginning of this action notice of the facts relating to this claim. In fact, Fenton has had complete document and testimonial discovery on this subject, including several depositions of various Mint and other Government personnel relating to Mint policy and practices and the theft. Both parties have from the outset of this litigation recognized that the question of which party has valid "title" to the coin is an issue in the case.[11] Further, while the amendment would technically add Fenton as a party to the lawsuit, he has already appeared as claimant in the in-rem

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[11] For example, Mr. Berke's January 19 letter anticipates defending against the replevin claim, as he contends (incorrectly) that the Government has "relinquish[ed] title" and that the Government has "surrendered its claim of title over the coin." (Berke Jan. 19 letter p. 6).

action, and this would in effect be no change at all. It is therefore appropriate that the pleadings be amended to properly conform to the facts and issues actually being litigated. See Fed. R. Civ. P. 15(b).

Accordingly, the Government respectfully requests leave of the Court to serve and file a Third Amended Complaint to include a cause of action for declaratory judgment that the United States is and has at all times been the true title owner of the coin.[12]

Very truly yours,

MARY JO WHITE
United States Attorney

By: Jane A. Levine
Jane A. Levine
Assistant United States Attorney
Telephone: (212) 637-1063

cc: Barry Berke, Esq.
Counsel for Fenton

Mark G. Flaherty, Esq.
J. Bradley Leitch, Esq.
Counsel for Parrino

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[12] The Government respectfully requests permission to submit a copy of the proposed Third Amended Complaint by January 28.

Exhibit I

Exhibit J

UNITED STATES GOVERNMENT

# Memorandum

TO : Miss Adams. DATE: May 27, 1965.

FROM : Miss Hayden.

SUBJECT: Former Secretary Snyder's call re certain gold coins.

On May 24th you called to say that Mr. Snyder was interested in getting a special list of people authorized to buy some $20 gold pieces around the time we stopped gold coinage. You asked whether there was such a list and if so, was it o.k. for him to have it.

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There was no special preference list for this or any other gold coin. The $20 pieces were all melted; none were ever issued from the Mint.

9 which had been stolen from the Mint were subsequently recovered from private individuals who had purchased them from coin dealers, and these were also destroyed.

The only known specimens are the 2 in the Smithsonian. A third, which had been exported to King Farouk, never has been returned to this country so far as we know; we have no information as to its actual existence.

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Prior to the issuance of the first gold orders in March of 1933, 100 eagles ($10) had been delivered to the Treasurer of the U. S., probably for sale over the counter to the public, and one had been paid out at the Philadelphia Mint. No list has been found indicating to whom these were paid out. The balance were melted and formed into bars.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

000015

Exhibit J

Exhibit J

# Buyer's Guide to United States Gold Coins

By Q. David Bowers

Foreword by David W. Akers
U.S. Gold Coin Survey by Richard A. Bagg, Ph.D

# Eagles

| | Philadelphia | Carson City | Denver |
|---|---|---|---|
| 1885 | B | — | — |
| 1886 | B | — | — |
| 1887 | AA | — | — |
| 1888 | AA | — | — |
| 1889 | B | — | — |
| 1890 | B | B | — |
| 1891 | B | B | — |
| 1892 | B | B | — |
| 1893 | B | AA | — |
| 1894 | B | — | — |
| 1895 | B | — | — |
| 1896 | B | — | — |
| 1897 | B | — | — |
| 1898 | B | — | — |
| 1899 | B | — | — |
| 1900 | B | — | — |
| 1901 | B | — | — |
| 1902 | B | — | — |
| 1903 | B | — | — |
| 1904 | B | — | — |
| 1905 | B | — | — |
| 1906 | B | — | B |
| 1907 | B | — | B |
| 1908 | B | — | B |
| 1909 | B | — | B |
| 1910 | B | — | B |
| 1911 | B | — | B |
| 1912 | B | — | — |
| 1913 | B | — | — |
| 1914 | B | — | B |
| 1915 | B | — | — |
| 1916 | — | — | — |
| 1917 | — | — | — |
| 1918 | — | — | — |
| 1919 | — | — | — |
| 1920 | — | — | — |
| 1921 | — | — | — |
| 1922 | — | — | — |
| 1923 | — | — | — |
| 1924 | — | — | — |
| 1925 | — | — | — |
| 1926 | B | — | — |
| 1927 | — | — | — |
| 1928 | — | — | — |
| 1929 | — | — | — |
| 1930 | — | — | — |
| 1931 | — | — | — |
| 1932 | B | — | — |
| 1933 | B | — | — |

Explanatory Notes: B indicates more than 12 appearances in Uncirculated grade at public auction without regard to repetitious offerings, 1972-mid 1988; AAAA = 0 appearances; AAA = 1-3 appearances, AA = 4-6 appearances; A = 7-12 appearances; a dash indicates none minted.

Index No. 96 Civ. 2527 (AKH)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

- against -

A $20 GOLD COIN, KNOWN AS A 1933 "DOUBLE EAGLE" MINTED AT THE UNITED STATES MINT IN PHILADELPHIA, PENNSYLVANIA,

Defendant-in-rem.

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SUPPLEMENTAL DECLARATION OF BARRY H. BERKE IN SUPPORT OF CLAIMANT STEPHEN C. FENTON'S MOTION FOR SUMMARY JUDGMENT

---

Kramer, Levin, Naftalis & Frankel
*Attorneys for* Claimant Stephen C. Fenton

919 Third Avenue, New York, NY 10022
(212) 715-7560

*All communication should be referred to* Barry H. Berke (BB 1421)